

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

DESIGNWORKS HOMES, INC., et al.)
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Plaintiffs,)
)
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v.) Case No.: 2:18-cv-04090-BCW
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COLUMBIA HOUSE OF BROKERS)
REALTY, INC. dba HOUSE OF)
BROKERS, INC., et al.,)
)
)
Defendants.)

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO LIFT STAY

Defendants do not oppose Plaintiffs' Motion to Lift Stay (Doc. 146). The Eighth Circuit reversed the Court's grant of summary judgment in favor of Defendants on grounds that the accused floorplans are exempt from infringement pursuant to 17 U.S.C. § 120(a) and issued a mandate. Doc. 137. On June 27, 2022, the Supreme Court denied Defendants' petition for certiorari. Doc. 144. But issues remain unresolved from Defendants' summary judgment motion (Doc. 72).

Plaintiffs did not appeal the portion of this Court's summary judgment ruling (Doc. 106):

- (i) that Plaintiffs are not entitled to statutory damages (Doc. 106 at 9);
- (ii) dismissing Plaintiffs' infringement claims of Registrations U and C (Doc. 106 at 8); and
- (iii) dismissing Plaintiffs' VARA claims (Doc. 106 at 16).

It is now time for the Court to rule on the remaining issues presented in Defendants' motion for summary judgment. Defendants' motion for summary judgment (Doc. 72) is fully briefed (including supplemental briefs, Docs. 145 and 151) and is ready for ruling. There are no relevant disputed issues of fact. Plaintiffs did not even respond to Defendants' statement of

uncontroverted facts. See Doc. 77 at pg. 6. Therefore, all salient facts have been admitted (Local Rule 56.1(b)(1)) and defendants are entitled to summary judgment.

The issues remaining in Defendants' motion for summary judgment include:

- The threshold issue of what work Plaintiffs' claim has been infringed, the architectural plans for 1713 Kenilworth, which Plaintiffs registered, or the home itself, that Plaintiffs did not register. SOF 13. It is undisputed that Defendants did not have access to the architectural plans (SOF 21-23) so there could not have been any copying and any claims of infringement of the architectural plans must be dismissed.

See Designworks Homes, Inc. v. Thompson Sailors Homes LLC, Case No. 18-cv-189, 2019 WL 5088764, *2-3 (Oct. 10, 2019 W.D. Mo). Plaintiffs did not register the home itself, so any claims of infringement of the home itself must be dismissed.

Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 887 (2019); *see also* 37 C.F.R. § 202.11(c)(3) (“Where dual copyright claims exist in technical drawings and the architectural work depicted in the drawings, any claims with respect to the technical drawings and architectural work must be registered separately.”)

- Defendants' request for summary judgment on its defense of fair use pursuant to 17 U.S.C. § 107; “Although the issue of fair use is a mixed question of law and fact, the court may resolve issues of fair use at the summary judgment stage where there are no genuine issues of material fact as to such issues.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d. Cir. 2006); *see also* *LA News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998).
- Defendants request for summary judgment on Plaintiffs' claims of vicarious and contributory infringement;

- Defendants' request for summary judgment on Plaintiffs' claim for lost profits and actual damages.

WHEREFORE, Defendants join Plaintiffs in respectfully asking the Court to lift its stay and rule on the remaining issues before the Court on Defendants' motion for summary judgment.

Dated: July 27, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Patrick D. Kuehl, Jr.
Attorney for Defendants